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CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY RM DEPUTY

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CALIPATRIA STATE PRISON (ASU, E-POD #148)
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NUNC PRO TUNC
AUG - 5 2008

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

NEHEMIAH ROBINSON,

Plaintiff,

v.

T. CATLETT, ET AL.,

Defendants.

08-CV-00161-H (BLM)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT.

HEARING:	AUGUST 28, 2008
TIME:	9:00 A.M.
COURTROOM:	SUITE 5140
JUDGE:	THE HONORABLE BARBARA L. MAJOR

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PREFACE

IN THIS OPPOSITION THE PLAINTIFF WILL RESPOND TO PORTIONS OF THE ATTORNEY GENERAL'S MOTION TO DISMISS WHERE ADDITIONAL COMMENT APPEARS LIKELY TO BE HELPFUL TO THE COURT IN DECIDING THIS CASE. TO THE EXTENT CONSISTENT AND POSSIBLE WITH THAT OBJECTIVE REPETITION OF THE PLAINTIFF'S "FAC" WILL BE AVOIDED TO CONVENIENT THE COURT. YET PLAINTIFF WILL BE

RE-ALLEGING AND INCORPORATING BY REFERENCE ALLEGATIONS IN THE FAC[1]. THE PLAINTIFF CONTINUES TO RELY PRIMARILY ON THE FAC, AND THE ABSENSE OF ADDITIONAL COMMENT ON ASPECTS OF THE ATTORNEY GENERAL'S MOTION TO DISMISS IN THIS OPPOSITION SHOULD NOT BE TAKEN AS A CONCESSION OF ANY NATURE. THIS EFFORT TO KEEP THE OPPOSITION AS SHORT AS POSSIBLE SHOULD NOT BE SEEN AS A LACK OF CONFIDENCE IN THE MERITS OF THE MATTERS NOT ADDRESSED. THE CASE AND FACTS ARE FULLY AND ACCURATELY STATED IN THE PLAINTIFF'S FAC.

I.

INTRODUCTION

PLAINTIFF RE-ALLEGES AND INCORPORATE BY REFERENCE EACH ALLEGATION IN PARAGRAPHS NO. 1.) THROUGH 74.); AND PAGES 1. THROUGH 33. OF THE FAC INCLUSIVE AS IF ALLEGED HEREIN.

II.

PLAINTIFF'S ALLEGATIONS AND FACTS TO BE CONSIDERED

A. FACTS RELATING TO THE LOWER BUNK.

PLAINTIFF RE-ALLEGES AND INCORPORATE BY REFERENCE EACH ALLEGATION IN PARAGRAPHS NO. 1.) THROUGH 16.); AND PAGES 7. THROUGH 11. OF THE FAC INCLUSIVE AS IF ALLEGED HEREIN.

B. FACTS RELATING TO PLAINTIFF BEING DENIED HIS WALKING CANE DUE TO A FALSE REPORT.

PLAINTIFF RE-ALLEGES AND INCORPORATE BY REFERENCE EACH ALLEGATION IN PARAGRAPHS NO. 25.) THROUGH 34.); AND PAGES 14. THROUGH 16. OF THE FAC INCLUSIVE AS IF ALLEGED HEREIN. PLAINTIFF ASSERT THAT AT P. 5 LL 16-26. OF DEFENDANTS MOTION TO DISMISS, REFER TO FACTS OUTSIDE THE COMPLAINT

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[1] FIRST AMENDMENT COMPLAINT (HEREAFTER "FAC").

AND IMMATERIAL.[2] IT IS ALSO IMMATERIAL THAT PLAINTIFF WAS PROVIDED A REPLACEMENT CANE (DEFENDANTS MOTION TO DISMISS AT P. 6 LL 11.)

C. FACTS RELATING TO PLAINTIFF BEING DENIED A WALKING CANE BY OTHER DEFENDANTS.

PLAINTIFF RE-ALLEGES AND INCORPORATE BY REFERENCE EACH ALLEGATION IN PARAGRAPHS NO. 41.) THROUGH 53.); AND PAGES 20. THROUGH 22. OF THE FAC INCLUSIVE AS IF ALLEGED HEREIN.

D. FACTS RELATING TO THE DENIAL OF PAIN MEDICATION.

PLAINTIFF RE-ALLEGES AND INCORPORATE BY REFERENCE EACH ALLEGATION IN PARAGRAPHS NO. 59.) THROUGH 66.); AND PAGES 25. THROUGH 27. OF THE FAC INCLUSIVE AS IF ALLEGED HEREIN. PLAINTIFF ASSERT THAT AT P. 8. LL 19-22. OF DEFENDANTS MOTION TO DISMISS, THE DEFENDANTS MISREPRESENT PLAINTIFF'S ALLEGATION'S. SPECIFICALLY, AT P. 8. LL 18. OF DEFENDANTS MOTION TO DISMISS, IT STATES IN SHORT, "REFILL OR PRESCRIBE PAIN MEDICATION" (EMPHASIS ADDED) DEFENDANTS STATES AT P. 8. LL 23-25. THAT "TRAMADOL HAD BEEN REMOVED FROM THE REVISED MAY 2007 CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION FORMULARY, AND THE RESULTING NEED TO OBTAIN CLARIFICATION FROM SACRAMENTO REGARDING USAGE OF TRAMADOL CAUSED A DELAY" HOWEVER, AT P. 8. LL 2-7. OF DEFENDANTS MOTION TO DISMISS, DEFENDANT SALGADO SPECIFICALLY STATE AT 1.) THROUGH 3.) THAT PLAINTIFF'S MEDICATION WAS ORDERED ON MAY 23, 2007, "BUT WAS NEVER NOTED" AND THAT PLAINTIFF "SHOULD HAVE RECEIVED HIS MEDICATION THAT DAY OR THE NEXT DAY", THAT HE WOULD DISCUSS THE ISSUE WITH B YARD MEDICAL STAFF REGARDING

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[2] PLAINTIFF ASSERT THAT HE SUBMITTED A CDC 602 (INMATE/PARDLEE APPEAL) TO CORRECTIONAL OFFICER J. COSME ON 06-25-08, STAFF COMPLAINT, AGAINT THE FOLLOWING REPORTING EMPLOYEES OF THE ALLEGED RULE VIOLATION REPORT (CDC 115) DATED 08-17-07, LOG NO. 08-07-B20, CRIME/INCIDENT REPORT LOG NO. CAL-FBY-07-08-0240, CORRECTIONAL OFFICERS, 1.) B-YARD (A) SGT. C. NEAL, 2.) J. TORRENT, 3.) M. DAVILA, AND 4.) J. RIVAS, WITH ATTACHMENTS, ALLEGING PENAL CODE VIOLATION'S § 118.1 (PEACE OFFICER FALSE REPORT), § 141. (a)(b) (PEACE OFFICERS; INTENTIONAL ALTERATION OF PHYSICAL MATTER WITH INTENT TO CHARGE PERSON WITH A CRIME; FELONY), § 182. (a)(2)(5) (DEFINITION; PUNISHMENT; VENUE; EVIDENCE NECESSARY TO SUPPORT CONVICTION. THE CDC 602 (INMATE/PAROLEE APPEAL) IS DATED 06-16-08, ADDRESSED TO "MR. LARRY SMALL, WARDEN", CONFIDENTIAL LEGAL MAIL, HERE AT CALIPATRIA STATE PRISON, CALIFORNIA (7018 BLAIR ROAD, CALIPATRIA, CA. 92233). THE STAFF COMPLAINT IS PENDING REVIEW. AND SAID CORRECTIONAL OFFICERS 1.) THROUGH 4.) WILL BE ADDED AS DEFENDANTS IN THE NEAR FUTURE.

"PREVENTIONS OF THESE TYPE OF ISSUES ..." (EMPHASIS ADDED)

III.

LEGAL STANDARD FOR MOTION TO DISMISS

IN DECIDING A RULE 12(b) MOTION, THE DISTRICT COURT MUST ASSUME THAT EVERY FACT ALLEGED IN THE COMPLAINT IS TRUE. IT MUST ALSO DRAW ALL REASONABLE INFERENCES FROM THOSE ALLEGATIONS IN PLAINTIFF'S FAVOR. UNITED STATES V. GAUBERT, 499 U.S. 315, 327 (1991); SCHEUER V. RHODES, 416 U.S. AT 236-37. THE COURT MUST THEN ASK WHETHER, ACCEPTING ALL THOSE FACTS, THERE IS ANY POSSIBILITY THAT PLAINTIFF CAN BE ENTITLED TO ANY FORM OF RELIEF. IF ANY COMBINATION OF THE FACTS STATED IN THE COMPLAINT MIGHT QUALIFY FOR ANY FORM OF COURT ACTION UNDER SECTION 1983, THEN THE COURT IS LEGALLY REQUIRED TO DENY THE DEFENDANTS MOTION TO DISMISS THE COMPLAINT. THE UNITED STATES SUPREME COURT HAS STATED THIS TEST VERY STRONGLY IN TWO CASES INVOLVING PRISONERS' SUITS UNDER SEC. 1983. CRUZ V. BETO, 405 U.S. 319 (1972); HAINES V. KERNER, 404 U.S. 519 (1972). IN CRUZ, THE COURT SAID THAT A COMPLAINT "SHOULD NOT BE DISMISSED FOR FAILURE TO STATE A CLAIM UNLESS IT APPEARS BEYOND DOUBT THAT PLAINTIFF CAN PROVE NO SET OF FACTS IN SUPPORT OF HIS CLAIM WHICH WOULD ENTITLE HIM TO RELIEF." 405 U.S. AT 332, QUOTING FROM CONLEY V. GIBSON, 355 U.S. 41, 45-46 (1957). IN HAINES, THE COURT ADDED THAT IN CONSIDERING A MOTION TO DISMISS, A PRO SE COMPLAINT SHOULD BE HELD TO "LESS STRINGENT STANDARDS THAN THE FORMAL PLEADINGS DRAFTED BY LAWYERS", 404 U.S. AT 520. SEE RESNICK V. HAYES, 213 F. 3d 443, 446 (9TH CIR. 2000).

IF THE COURT DECIDES TO DISMISS THE COMPLAINT, THE COURT MUST SEND PLAINTIFF A STATEMENT OF THE GROUNDS FOR HIS ACTIONS. PLAINTIFF IS ENTITLED TO "AN OPPORTUNITY TO AMEND THE COMPLAINT TO OVERCOME THE DEFICIENCY UNLESS IT CLEARLY APPEARS FROM THE COMPLAINT THAT

THE DEFICIENCY CANNOT BE OVER-COME BY AMENDMENT." POTTER V. MC CALL, 433 F. 2d 1087 (9TH CIR. 1970); ARMSTRONG V. RUSHING, 352 F. 2d. 836, 837 (9TH CIR. 1965). F.R.C.P. 8(a)(2) REQUIRES ONLY "A SHORT AND PLAIN STATEMENT SHOWING THAT THE PLEADER IS ENTITLED TO RELIEF." A PLAINTIFF NEED ONLY STATE THE BASIC FACTS OF HIS CLAIM. IN CRAWFORD-EL V. BRITTON, 523 U.S. 574 (1998), THE SUPREME COURT HELD THAT FEDERAL RULES DO NOT PERMIT THE IMPOSITION OF A HIGHTENED BURDEN OF PROOF IN §1983 LAWSUITS AGAINST INDIVIDUAL OFFICIALS, WHERE THE PLAINTIFF'S CLAIM DEPENDS ON PROVING A DEFENDANT'S IMPROPER MOTIVE. Id. AT 584-94.

IV.

THE FIRST COUNT SHOULD NOT BE DISMISSED

PLAINTIFF RE-ALLEGES AND INCORPORATE BY REFERENCE ALLEGATION IN PARAGRAPHS NO. 1.) THROUGH 24.); AND PAGES 7. THROUGH 13. OF THE FAC INCLUSIVE AS IF ALLEGED HEREIN, AND AT A.

A. ALLEGEDLY NOT ASSIGNING PLAINTIFF A LOWER BUNK FROM OR ABOUT FEBRUARY 6, 2006, TO MAY 4, 2006, DID AMOUNT TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT.

THE TREATMENT A PRISONER RECEIVE IN PRISON AND THE CONDITION UNDER WHICH THE PRISONER IS CONFINED ARE SUBJECT TO SCRUTINY UNDER THE EIGHT AMENDMENT, WHICH PROHIBITS CRUEL AND UNUSUAL PUNISHMENT. SEE FARMER V. BRENNAN, 511 U.S. 825, 832 (1994). THE EIGHTH AMENDMENT "... EMBODIES BROAD AND IDEALISTIC CONCEPTS OF DIGNITY CIVILIZED STANDARDS, HUMANITY AND DECENCY." ESTELLE, 429 U.S. AT 102. A PRISON OFFICIAL VIOLATES THE EIGHTH AMENDMENT ONLY WHEN TWO REQUIREMENTS ARE MET: (1) OBJECTIVELY, THE OFFICIAL ACT OR OMISSION MUST BE SO SERIOUS SUCH THAT IT RESULTS IN THE DENIAL OF THE MINIMAL CIVILIZED MEASURES OF LIFE'S NECESSITIES; (2)

SUBJECTIVELY, THE PRISON OFFICIALS MUST HAVE ACTED UN-NECESSARILY AND WANTONLY FOR THE PURPOSE OF INFLICTING HARM. SEE FORMER, 511 U.S. AT 834. THUS, TO VIOLATE THE EIGHTH AMENDMENT, A PRISON OFFICIAL MUST HAVE A "SUFFICIENTLY CULPABLE MIND". SEE Id. DELIBERATE INDIFFERENCE TO A PRISONERS SERIOUS ILLNESS "OR INJURY, OR RISK OF SERIOUS INJURY "OR ILLNESS, GIVES RISE TO UNDER THE EIGHT AMENDMENT. SEE ESTELLE, 429 U.S. AT 105; SEE ALSO FORMER, 511 U.S. AT 837. THIS APPLIES TO PHYSICAL AS WELL AS DENTAL AND MENTAL HEALTH NEEDS. SEE HOPTOWIT V. RAY, 682 F. 2d 1237, 1253 (9TH CIR. 1982). AN INJURY OR ILLNESS IS SUFFICIENTLY SERIOUS IF THE FAILURE TO TREAT A PRISONER'S CONDITION COULD RESULT IN FURTHER SIGNIFICANT INJURY OR THE ... UNNECESSARY AND WANTON INFLICTION OF PAIN." MC GUCKIN V. SMITH, 974 F. 2d 1050, 1059 (9TH CIR. 1992). FACTORS INDICATING SERIOUSNESS ARE: (1) WHETHER A REASONABLE DOCTOR WOULD THINK THAT THE CONDITION IS WORTHY OF COMMENT; (2) WHETHER THE CONDITION SIGNIFICANTLY IMPACTS THE PRISONER'S DAILY ACTIVITIES; AND (3) WHETHER THE CONDITION IS CHRONIC AND ACCOMPANIED BY SUBSTANTIAL PAIN. SEE LOPEZ V. SMITH, 203 F. 3d 1122, 1131-32 (9TH CIR. 2000) (en ban.). THE REQUIREMENT OF DELIBERATE INDIFFERENCE IS LESS STRINGENT IN MEDICAL NEEDS CASES THAN IN OTHER EIGHT AMENDMENT CONTEXT BECAUSE THE RESPONSIBILITY TO PROVIDE INMATES WITH MEDICAL CARE DOES NOT GENERALLY CONFLICT WITH COMPETING PENOLOGICAL CONCERNS MCGUCKIN, 974 F. 2d AT 1060. THUS, DEFERENCE NEED NOT BE GIVEN TO THE JUDGEMENT OF PRISON OFFICIALS AS TO DECISIONS CONCERNING MEDICAL NEEDS. SEE HUNT V. DENTAL DEPT, 865 F. 2d 198, 200 (9TH CIR. 1989). THE COMPLETE DENIAL OF MEDICAL ATTENTION MAY CONSTITUTE DELIBERATE INDIFFERENCE. SEE TOUSSAINT V. MC CARTHY, 801 F. 2d. 1080, 1111 (9TH CIR. 1986). DELAY IN PROVIDING MEDICAL TREATMENT, OR

INTERFERENCE WITH MEDICAL TREATMENT, MAY ALSO CONSTITUTE DELIBERATE INDIFFERENCE. SEE LOPEZ, 203 F. 3d AT 1131. WHERE DELAYS IS ALLEGED, HOWEVER, THE PRISONER MUST ALSO DEMONSTRATE THAT THE DELAY LED TO FURTHER INJURY. SEE MC GUCKIN, 947 F. AT 1060.

A SUPERVISOR IS ONLY LIABLE FOR THE CONSTITUTIONAL VIOLATION OF SUBORDINATES IF THE SUPERVISOR PARTICIPATED IN OR DIRECTED THE VIOLATIONS, OR KNEW OF THE VIOLATIONS AND FAILED TO ACT TO PREVENT THEM. SEE Id. WHEN A DEFENDANT HOLDS A SUPERVISORY POSITION, THE CASUAL LINK BETWEEN HIM AND THE CLAIMED CONSTITUTIONAL VIOLATION MUST BE SPECIFICALLY ALLEGED. SEE FAYE V. STAPLEY, 607 F.2d. 858, 862, (9TH CIR. 1979); JOHNSON V. DUFFY 588 F. 2d. 740 (9TH CIR. 1979); HUNT V. DENTAL DEPT. 865 F. 2d 198 (9TH CIR. 1989).

PLAINTIFF ASSERT THAT THE DEFENDANTS ARGUMENT IS BASELESS, AND UNREALISTIC (DEFENDANTS MOTION TO DISMISS AT P. 12. LL 13-25.) FOR ONE, DEFENDANTS' FAIL TO ACKNOWLEDGE THAT THEY KNEW IN ADVANCE THAT PLAINTIFF SUFFERED FROM A SERIOUS MEDICAL CONDITION AND/OR DISABILITY AND MEDICAL REQUIRED A "LOWER TIER" AND "LOWER BUNK" SETTING TO ACCOMMODATE PLAINTIFF'S CONDITION AND/OR DISABILITY; TWO, DEFENDANTS' KNEW THAT THE LONE INMATE THAT OCCUPIED CELL # 133 WAS INFACT ASSIGNED TO THE LOWER BUNK PRIOR TO PLAINTIFF'S ASSIGNMENT TO CELL # 133; THREE, DEFENDANTS' KNEW THAT THE LONE INMATE THAT OCCUPIED CELL # 133 SUFFERED FROM A BAD BACK, A BAD KNEE AND WEIGHED WELL OVER 230 POUNDS THUS, THERE IS NO WAY HE COULD HAVE MOVED AND/OR BE ASSIGNED TO THE UPPER BUNK BECAUSE OF HIS PHYSICAL CONDITION, NOR SHOULD PLAINTIFF HAVE BEEN PLACED IN CELL # 133 WITH DEFENDANTS' KNOWING THIS IN ADVANCE; FOUR, CELL # 144, LOCATED IN FACILITY "B", BUILDING # 1, "WAS VACANT" FOR "SEVEN-DAYS" AND DEFENDANTS FAILED TO ACT, AND SAID CELL # 144 IS LOCATED ON THE LOWER TIER, ELEVEN-CELLS DOWN FROM PLAINTIFF'S THEN CELL OF

#133; FIVE, ON OR ABOUT 03-17-06, PLAINTIFF SUBMITTED A CDC 602 (INMATE/PAROLEE APPEAL) TO DEFENDANTS THAT WAS SHUFFLED FROM HAND TO HAND AND WAS LATER LOSSED AND/OR DESTROYED WHICH PROMPTED THE FILING OF CDC 602 (INMATE/PAROLEE APPEAL) DATED 03-29-06, LOG NO. CAL-06-00951; SIX, NO OTHER ALTERNATIVE MEASURES WERE TAKEN TO ACCOMMODATE PLAINTIFF UNTIL "MONTHS" AFTER THE FACT BY WAY OF AN APPEAL; SEVEN, DEFENDANTS ACTIONS CAUSED AND/OR RESULTED IN WANTON INFLICTION OF PAIN AND FURTHER INJURY. DEFENDANTS T. CATLETT[3], W. PRICE, M BOURLAND, AND J. TILTON (DIRECTOR/SECRETARY OF CDCR) REVIEWED THE CDC 602 (INMATE/PAROLEE APPEAL) DATED 03-29-06, LOG NO. CAL-06-00951, WITH THE REASONABLE ACCOMMODATION REQUEST ATTACHED, AND PARTICIPATED IN THE MISCONDUCT COMMITTED BY DEFENDANTS T. CATLETT, G. GARRETT, M. ARVIZU, IN FAILING IN THEIR REQUIRED DUTY TO MANAGE AND SUPERVISE THE OFFICERS, AND/OR PREVENT OR REPORT THE MISCONDUCT TO THE NECESSARY OFFICIALS AS AN ACT OF MISCONDUCT FOR INVESTIGATION AND/OR REPRIMAND OR DISCIPLINE THE OFFICERS.

B. ALLEGEDLY DELIBERATELY INDIFFERENTLY DENYING PLAINTIFF A LOWER BUNK FROM OR ABOUT FEBRUARY 6, 2006, TO MAY 4, 2006, WAS AN EQUAL PROTECTION VIOLATION.

PLAINTIFF RE-ALLEGES AND INCORPORATE BY REFERENCE EACH ALLEGATION IN PARAGRAPHS NO. 1.) THROUGH 24.); AND PAGES 7. THROUGH 13. OF THE FAC; IV. A. PAGES 5 THROUGH 8 OF OPPOSITION. INCLUSIVE AS IF ALLEGED HEREIN. THE FOURTEENTH AMENDMENT PROHIBITS THE GOVERNMENT FROM INTENTIONALLY DENYING A PERSON "THE EQUAL PROTECTION OF THE LAWS." EDMONDSON V. LEESVILLE CONCRETE CO., 500 U.S. 614, 616 (1991). INTENT TO DISCRIMINATE IS A REQUIRED ELEMENT OF ANY EQUAL PROTECT-

[3] AS PREVIOUSLY POINTED OUT BY PLAINTIFF, DEFENDANT T. CATLETT VIOLATED 15 CCR § 3084.5. (e) BY REVIEWING THE APPEAL, WHICH SHOWS HIS "INTENT".

ION CLAIM; "DISPARATE IMPACT" IS NOT ENOUGH. WASHINGTON V. DAVIS, 426 U.S. 229 (1976). RACIAL SEGREGATION "OR DISCRIMINATION" IN PRISONS IS UNCONSTITUTIONAL" UNDER THE EQUAL PROTECTION" AND DUE PROCESS CLAUSE OF THE 14TH AMENDMENT. WASHINGTON V. LEE 263 F. SUPP 327 (M.D. ALA 1966) AFF'D 390 U.S. 333 (1968). IF THE ACTION IN QUESTION DOES NOT INVOLVE A SUSPECT CLASSIFICATION, A PLAINTIFF MAY ESTABLISH AN EQUAL PROTECTION CLAIM BY SHOWING THAT SIMILARLY SITUATED INDIVIDUALS WERE INTENTIONALLY TREATED DIFFERENTLY WITHOUT A RATIONAL RELATIONSHIP TO A LEGITIMATE STATE PURPOSE. VILLAGE OF WILLOWBROOK V. OLECH, 528 U.S. 562, 564 (2000); SEE JOHNSON V. CALIFORNIA (2005) 543 U.S. 499 [125 S.Ct. 1141, 1146, 1148-1149; 160 L. Ed. 2d 949]. (APPLYING "STRICT SCRUTINY TEST".)

PLAINTIFF ASSERT THAT THE DEFENDANTS ARGUMENT IS BASELESS, AND UNREALISTIC (DEFENDANTS MOTION TO DISMISS AT P. 14 LL 11-14.) THE EQUAL PROTECTION CLAIM IN COUNT ONE SHOULD NOT BE DISMISSED.

C. PLAINTIFF DOES ALLEGE A DUE PROCESS VIOLATION.

PLAINTIFF RE-ALLEGES AND INCORPORATE BY REFERENCE EACH ALLEGATION IN PARAGRAPHS NO. 1.) THROUGH 73.); AND PAGES 7. THROUGH 29. OF THE FAC; IV. A.B. PAGES 5 THROUGH 9 OF OPPOSITION. INCLUSIVE AS IF ALLEGED HEREIN. WITHIN THE U.S. CONSTITUTION, THE MAIN PROTECTION AGAINST ACTIONS BY STATE OFFICIALS IS FOUND IN THE "FOURTEENTH AMENDMENT": "NO STATE SHALL ... DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY WITHOUT DUE PROCESS OF THE LAW. THIS GUARANTEE IS KNOWN AS THE "DUE PROCESS CLAUSE". THE COURT HAVE RULED THAT THE DUE PROCESS CLAUSE PROTECT PRISONERS. FOR EXAMPLE: JOHNSON V. AVERY, 393 U.S. 483 (1969) (DUE PROCESS). DUE PROCESS MEANS PRISON OFFICIALS ARE NOT SUPPOSED TO "INJURE YOU PHYSICALLY."

. . . WITHOUT FAIR PROCEDURES. THE COURTS HAVE RULED THAT THE DUE PROCESS CLAUSE ALSO "INCORPORATES" MOST OF THE BILL OF RIGHTS. TECHNICALLY, THE FIRST TEN AMENDMENTS TO THE U.S. CONSTITUTION — KNOWN AS THE BILL OF RIGHTS — APPLY ONLY TO ACTIONS BY THE U.S. GOVERNMENT. HOWEVER, WHEN A STATE OR LOCAL OFFICIAL DOES SOMETHING THAT IS PROHIBITED BY ONE OF THE FIRST TEN AMENDMENTS, HE MAY VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT. THE DUE PROCESS CLAUSE INCORPORATES YOUR RIGHTS UNDER THE EIGHTH AMENDMENT AGAINST "CRUEL AND UNUSUAL PUNISHMENT." SEE LOUISIANA EX REL. FRANCIS V. RESWEBER, 329 U.S. 459 (1947), [DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT INCORPORATES THE EIGHTH AMENDMENT'S GUARANTEES AGAINST CRUEL AND UNUSUAL PUNISHMENT]. AS TO DUE PROCESS PROTECTIONS ARISING FROM STATE LAW OR REGULATIONS, THE SUPREME COURT IN SANDIN V. CONNER, 515 U.S. 472 (1995), HELD THAT CONSTITUTIONALLY PROTECTED LIBERTY INTERESTS ARE "LIMITED TO FREEDOM FROM RESTRAINT WHICH... IMPOSES ATYPICAL AND SIGNIFICANT HARDSHIP ON THE INMATE IN RELATION TO THE ORDINARY INCIDENT OF PRISON LIFE." Id. AT 483-84. ADA INMATES WHOM SUFFER AN ATYPICAL AND SIGNIFICANT HARDSHIP DUE TO PRISONS RESTRICTION OR DEPRIVATION "OR DEPRIVATION OF AN ADA ENTITLEMENT" TRIGGERS DUE PROCESS PROTECTIONS. SERRANO V. FRANCIS (9TH CIR. 2003) 345 F.3d 1071, APPLYING SANDIN V. CONNER (1995) 515 U.S. 472 [115 S. Ct. 2293; 132 L. Ed. 2d 418]. LIBERTY INTERESTS PROTECTABLE BY THE FOURTEENTH AMENDMENT MAY ARISE FROM TWO SOURCES — THE DUE PROCESS CLAUSE ITSELF OR STATE LAW OR REGULATIONS. MEACHUM V. FANO, 427 U.S. 215, 224-27 (1976); WOLFF V. MC DONNELL, 418 U.S. 539, 557-58 (1974). WHERE THE COURT STATED: HOWEVER MINIMAL MAYBE THE PROCESS DUE TO PRISONERS BEFORE

SEGREGATION, THAT PROCESS IS INSUFFICIENT WHEN IT HAS BEEN CONTAMINATED BY THE INTRODUCTION THROUGH STATE ACTION OF FALSE INCULPATORY EVIDENCE. THE INTODUCTION OF FALSE EVIDENCE IN ITSELF VIOLATES THE DUE PROCESS CLAUSE. *** THE FACT THAT PRISONERS ARE NOT ENTITLED TO THE FULL PANOPLY OF PROCEDURAL PROTECTIONS AFFORDED AT TRIAL WHEN THEY ARE SUBJECT TO INTERNAL PRISON DISCIPLINE DOES NOT DEPRIVE THEM OF THE FUNDAMENTAL RIGHT NOT TO HAVE STATE OFFICIALS MAKE PURPOSEFULLY FALSE STATEMENTS ABOUT THEM. MORRISON V. LE FEVRE, 592 F. SUPP. 1052, 1073 (S.D.N.Y. 1984) (CITATIONS OMITED)

PLAINTIFF'S COUNTS ONE THROUGH FOUR TRIGGERS DUE PROCESS.

D. PLAINTIFF'S AMERICANS WITH DISABILITIES ACT AND REHABILITATION ACT CLAIMS SHOULD NOT BE DISMISSED.

PLAINTIFF RE-ALLEGES AND INCORPORATE BY REFERENCE EACH ALLEGATION IN PARAGRAPHS NO. 1.) THROUGH 58.); AND PAGES 7. THROUGH 24. OF THE FAC INCLUSIVE AS IF ALLEGED HEREIN. IT IS THE POLICY OF THE CALIFORNIA DEPARTMENT OF CORRECTIONS (CDC) TO PROVIDE ACCESS TO ITS PROGRAMS AND SERVICES TO INMATES AND PAROLEES WITH DISABILITIES, WITH OR WITHOUT REASONABLE ACCOMMODATION, CONSISTENT WITH LEGITIMATE PENOLOGICAL INTERESTS. NO QUALIFIED INMATE OR PAROLEE WITH A DISABILITY AS DEFINED IN TITLE 42 OF THE UNITED STATES CODE, SECTION 12102 SHALL, BECAUSE OF THAT DISABILITY, BE EXCLUDED FROM PARTICIPATION IN OR DENIED THE BENEFITS OF SERVICES, PROGRAMS, OR ACTIVITIES OF THE DEPARTMENT OR BE SUBJECTED TO DISCRIMINATION. ALL INSTITUTIONS / FACILITIES HOUSING INMATES WITH DISABILITIES WILL ENSURE THAT HOUSING AND PROGRAMING ARE REASONABLE AND APPROPRIATE IN A MANNER CONSISTENT WITH THEIR

MISSION AND DEPARTMENT POLICY. (ARMSTRONG REMEDIAL PLAN AT P. 1 § I.). A "QUALIFIED INMATE/PAROLEE" IS ONE WITH PERMANENT PHYSICAL OR MENTAL IMPAIRMENT WHICH SUBSTANTIALLY LIMITS THE INMATE/PAROLEE'S ABILITY TO PERFORM A MAJOR LIFE ACTIVITY. MAJOR LIFE ACTIVITIES ARE FUNCTIONS SUCH AS CARING FOR ONE'S SELF, PERFORMING ESSENTIAL MANUAL TASKS, "WALKING", SEEING, HEARING, SPEAKING, BREATHING, LEARNING," AND WORKING." (ARMSTRONG REMEDIAL PLAN AT P. 1 § II. A.) A "PERMANENT DISABILITY OR IMPAIRMENT" IS ONE WHICH IS NOT EXPECTED TO IMPROVE WITHIN SIX MONTHS. (ARMSTRONG REMEDIAL PLAN AT P. 2 § II. B.) THE COURT PREVIOUSLY HELD THAT THE ADA APPLIES TO STATE PRISONS. PENNSYLVANIA DEPT. OF CORRECTIONS V. YESKEY, 524 U.S. 206 (1998). MORE OVER, 42 U.S.C. § 12101-(b)(4) EXPRESSLY ANNOUNCED THAT "STATES SHALL NOT BE IMMUNE UNDER THE ELEVENTH AMENDMENT... FOR AN ACTION IN [a] FEDERAL OR STATE COURT OF COMPETENT JURISDICTION FOR A VIOLATION OF THIS CHAPTER." BOARD OF TRUSTEES OF UNIV. OF ALA. V. GARRETT, 531 U.S. 356 (2001); SEE UNITED STATES V. GEORGIA, 126 S. Ct. 877 (2006), CITING THE ABOVE CASE.

PLAINTIFF ASSERT THAT THE DEFENDANTS ARGUMENT IS BASELESS, AND UNREALISTIC (DEFENDANTS MOTION TO DISMISS AT P. 16. LL 6-14.) THUS, THE ADA / REHABILITATION ACT CLAIMS SHOULD NOT BE DISMISSED FOR THE SAME REASON THE EIGHTH AMENDMENT CLAIM SHOULD NOT BE DISMISSED.

V.

THE SECOND COUNT SHOULD NOT BE DISMISSED

PLAINTIFF RE-ALLEGES AND INCORPORATE BY REFERENCE EACH ALLEGATION IN PARAGRAPHS NO. 25.) THROUGH 40.); AND PAGES 14-19. OF THE FAC; II. B. PAGES 2 THROUGH 3 OF OPPOSITION. INCLUSIVE AS IF ALLEGED HEREIN. PLAINTIFF ASSERT THAT THE DEFENDANTS

ARGUMENT IS "REPEATED", BASELESS, UNREALISTIC, AND IMMATERIAL TO THE CLAIM (DEFENDANTS MOTION TO DISMISS AT P. 17. LL 2-24. / AT P. 18. LL 1-13.)

COUNT TWO OF THE FIRST AMENDED COMPLAINT SHOULD NOT BE DISMISSED, AND IF SO, WITH LEAVE TO AMEND BECAUSE AMENDMENT WOULD CURE THE DEFECTS.

VI.

THE THIRD COUNT SHOULD NOT BE DISMISSED

PLAINTIFF RE-ALLEGES AND INCORPORATE BY REFERENCE EACH ALLEGATION IN PARAGRAPHS NO. 41.) THROUGH 58.); AND PAGES 20-24. OF THE FAC; IV. B. PAGES 8 THROUGH 9 OF OPPOSITION. INCLUSIVE AS IF ALLEGED HEREIN. THE ARMSTRONG REMEDIAL PLAN [AT P. 18-19 § IV. F. 1. 2. 3.]; SPECIFICALLY, AUTHORIZE PLAINTIFF'S USE AND POSSESSION OF A WALKING CANE; [AT P. 34-35 § IV. I. 22.]; SPECIFICALLY, STATE THE MANDATORY PROCEDURES TO BE ENFORCED BY CORRECTIONAL OFFICERS / OFFICIALS WHEN HEALTH CARE APPLIANCES ARE TAKEN AWAY; AND CORRECTIONAL OFFICERS / OFFICIALS FAILED IN THEIR MANDATORY DUTY TO ENFORCE THE POLICY / PROCEDURES IN THE ARMSTRONG REMEDIAL PLAN. PENAL CODE § 831.5. (a) SPECIFICALLY STATE, "A CUSTODY OFFICER" INCLUDES A PERSON DESIGNATED AS A "CORRECTIONAL OFFICER."

PLAINTIFF ASSERT THAT THE DEFENDANTS ARGUMENT IS "REPEATED", BASELESS, UNREALISTIC, AND IMMATERIAL TO THE CLAIM (DEFENDANTS MOTION TO DISMISS AT P. 19. LL 6-27.) THUS, COUNT THREE OF THE COMPLAINT SHOULD NOT BE DISMISSED, AND IF SO, WITH LEAVE TO AMEND BECAUSE AMENDMENT WOULD CURE THE DEFECTS.

VII.

THE FOURTH COUNT SHOULD NOT BE DISMISSED

PLAINTIFF RE-ALLEGES AND INCORPORATE BY REFERENCE EACH

ALLEGATION IN PARAGRAPHS NO. 59.) THROUGH 74.); AND PAGES 25-29. OF THE FAC; IV. A. PAGES 5 THROUGH 8 OF OPPOSITION. INCLUSIVE AS IF ALLEGED HEREIN. PLAINTIFF ASSERT THAT THE DEFENDANTS ARGUMENT IS "REPEATED", BASELESS, UNREALISTIC, AND IMMATERIAL TO THE CLAIM (DEFENDANTS MOTION TO DISMISS AT P. 20. LL 15-23; AT P. 21. LL 3-19; AT P. 22. LL 6-12.)

COUNT FOUR OF THE FIRST AMENDED COMPLAINT SHOULD NOT BE DISMISSED, AND IF SO, WITH LEAVE TO AMEND BECAUSE AMENDMENT WOULD CURE THE DEFECTS.

VIII.

DEFENDANTS SHOULD NOT BE DISMISSED IN THEIR OFFICIAL CAPACITY BECAUSE ALL PLAINTIFF'S REQUEST FOR INJUCTIVE RELIEF ARE WELL TAKEN; THE REQUESTS FOR INJUCTIVE RELIEF SHOULD ALSO NOT BE DISMISSED

PLAINTIFF RE-ALLEGES AND INCORPORATE BY REFERENCE EACH ALLEGATION IN PARAGRAPHS NO. 1.) THROUGH 74.); PAGES 1. THROUGH 33. OF THE FAC INCLUSIVE AS IF ALLEGED HEREIN. PLAINTIFF ASSERT THAT THE DEFENDANTS ARGUMENT IS BASELESS AND UNREALISTIC. (DEFENDANTS MOTION TO DISMISS AT P. 22. LL 17-19. / AT P. 24. LL 13-23.) DEFENDANTS SHOULD NOT BE DISMISSED IN THEIR OFFICIAL CAPACITY BECAUSE ALL OF PLAINTIFF'S REQUESTS FOR INJUNCTIVE RELIEF ARE WELL TAKEN.

FEDERAL COURTS HAVE THE POWER TO FORCE STATES AND STATE AGENCIES TO COMPLY WITH THE U.S. CONSTITUTION. UNDER WHAT IS CALLED "THE EX PARTE YOUNG FICTION". ACTION COULD BE BROUGHT AGAINST STATE OFFICIALS IN THEIR OFFICIAL CAPACITY FOR "INJUCTIVE RELIEF" TO FORCE THE STATE OR STATE AGENCY FOR WHOM THE OFFICIALS WORKS TO OBEY THE CONSTITUTION. SEE PENNHURST STATE SCH. & HOSP. V. HALDERMAN, 465 U.S. 89, 102-05 (1984); EXPARTE YOUNG, 209 U.S. 123, 160 (1908). THE SUPREME COURT STATED TO WIN AN INJUNCTION, AN INMATE MUST SHOW AN "ACTUAL OR IMMINENT INJURY" LEWIS V. CASEY, 518 U.S. 343, 349-50 (1996). THE PRISON LITIGATION

REFORM ACT (PLRA) STATES THAT A DISTRICT COURT MAY NOT ISSUE AN INJUNCTION " UNLESS THE COURT FINDS THAT SUCH RELIEF IS NORROWLY DRAWN, EXTENDS NO FURTHER THAN NECESSARY TO CORRECT THE VIOLATION OF THE FEDERAL RIGHT, AND IS THE LEAST INTRUSIVE MEANS NECESSARY TO CORRECT THE VIOLATION OF THE FEDERAL RIGHT. SEE 18 U.S.C. - § 3626(a). THESE REQUIREMENTS DO NOT APPEAR TO CHANGE THE LAW ON INJUCTIVE RELIEF THAT EXISTED BEFORE THE PLRA'S ENACTMENT. GOMEZ V. VERNON, 255 F. 3d 1118, 1129 (9TH CIR. 2001) (PLRA " HAS NOT SUBSTANTIALLY CHANGED THE THRESHOLD FINDINGS AND STANDARDS REQUIRED TO JUSTIFY INJUNCTION"). INJUNCTIVE RELIEF IS AWARDED TO PREVENT VIOLATIONS FROM OCCURING IN THE FUTURE (INJUNCTIVE RELIEF IS ALSO REFERRED TO AS PROSPECTIVE RELIEF; PROSPECTIVE MEANS "FUTURE".)

DEFENDANTS ALLEGES IN HIS MOTION TO DISMISS THAT PLAINTIFFS FAC FAIL TO ALLEGE ANY FACTS ESTABLISHING A PATTERN, PLAN OR POLICY TO HARASS, THREATEN, PUNISH OR RETALIATE AGAINST HIM BECAUSE HE FILED THIS ACTION, ET AL. (SEE DEFENDANTS MOTION TO DISMISS AT P. 24 LL 13-23.) PLAINTIFF ASSERT THAT HE HAS CLEARLY DEMONSTRATED THE FOREGOING TO THE COURT IN HIS FAC (SEE FAC AT PARAGRAPHS 17, 35, 54, 58, 60, AND 61.) WHEREAS PLAINTIFF STATE IN SHORT," AND THE HARM IS PART OF A PATTERN OF OFFICIALLY SANCTIONED . . . BEHAVIOR . . "; AND REFERS THE COURT TO THE LANDMARK COURT ORDERED CASES OF," ARMSTRONG V. SCHWARZENEGGER," AND " PLATA V. SCHWARZENEGGER" . IN ADDITION, "DEFENDANT T. CATLETT[4]" IS A DEFENDANT IN COUNT ONE AND TWO, AND RETALIATION COULD BE INFERRED

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4. DEFENDANT T. CATLETT DISCRIMINATED AGAINST PLAINTIFF'S DISABILITY AND VIOLATED HIS U.S. CONSTITUTIONAL RIGHTS ON 04-09-08 AND PLAINTIFF FILED A CDC1824 (REASONABLE ACCOMMODATION REQUEST), LOG NO. CAL-08-00630. DEFENDANT T. CATLETT AND CORRECTIONAL OFFICERS M. RAMIREZ AND VELASCO SPECIFICALLY STATED IN SHORT THAT: IT IS THEIR POLICY/PROCEDURE TO HAND-CUFF DISABLED INMATES TO THE FRONT AND TO DENY DISABLED INMATES CRUTCHES WHEN TRANSPORTING INMATES TO OFF-SITE HOSPITAL, REGARDLESS IF THE DISABLED INMATE HAVE, 1.) A MEDICAL CHRONO FOR " CRUTCHES AND, 2.) A MEDICAL CHRONO FOR " WAIST-CHAIN. PLAINTIFF PLAN TO SUPPLEMENT HIS FAC.

BASED ON DEFENDANT T. CATLETT'S PATTERN OF BEHAVIOR. DEFENDANT R. JOHNSON, AND DEFENDANT T. CATLETT PARTICIPATED IN THE RETALIATORY ACT COMMITTED BY CORRECTIONAL OFFICER J. MANNING AS A RESULT OF PLAINTIFF FILING HIS COMPLAINT. PLAINTIFF THEN FILED A CDC 602 (INMATE/ PAROLEE APPEAL) DATED 05-01-08, LOG NO. CAL-A-08-00782 RE: STAFF COMPLAINT. DEFENDANT G. JANDA[5] IS REVIEWING THE FOREGOING MATTER ON THE FIRST LEVEL. PLAINTIFF HAVE A CDC 602 (INMATE/PAROLEE APPEAL) DATED 03-13-08, LOG NO. CAL-A-08-0045 RE: STAFF COMPLAINT [AGAINST DEFENDANT G. JANDA] PENDING BEFORE DEFENDANT SECRETARY AND/OR DIRECTOR OF CDCR. IN ADDITION, THE FOLLOWING CDC 602'S (INMATE/PAROLEE APPEAL) ARE PENDING REVIEW FOR RETALIATION TO MATTERS DIRECTLY AND INDIRECTLY RELATED TO THE COMPLAINT: 1.) RE: DENIAL OF PAIN MEDICATION, DATED 03-29-08, LOG NO. CAL-A-08-00703; 2.) RE: FALSIFICATION OF DOCUMENTS, DATED 04-22-08, LOG NO. CAL-S-08-00765; 3.) RE STAFF COMPLAINT (FALSIFICATION OF DOCUMENTS/ OBSTRUCTING JUSTICE/ ALTERING AND MODIFYING EVIDENCE), DATED 06-16-08, LOG NO. CAL-S-08-01-558; 4.) RE: STAFF COMPLAINT (RETALIATION), DATED 06-26-08,[6] (HAVE NOT RECEIVED LOG. NO.); 5.) RE: DENIAL OF PAIN MEDICATION, DATED 06-29-08,[6] (HAVE NOT RECEIVED LOG NO.); 6) RE: STAFF COMPLAINT (OBSTRUCTING JUSTICE), DATED 07-22-08, (HAVE NOT RECEIVED LOG NO.); 7.) RE: STAFF COMPLAINT (RETALIATION), DATED 06-03-08,[6] ("HAVE NOT RECEIVED LOG NO.).

PLAINTIFF HAVE ALSO RECEIVED TWO FALSE AND RETALIATORY RULE

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[5] DEFENDANT G. JANDA HAVE NOT FOLLOWED THE 15 CCR TIME CONSTRAINTS FOR REVIEWING APPEALS NOR ITS MANDATORY REQUIREMENTS.

[6] THESE CDC 602'S WERE EITHER SCREENED-OUT BY THE APPEALS COORDINATOR OR RETURNED WITHOUT NOTIFICATION REFLECTING REASON FOR NOT PROCESSING. PLAINTIFF IMMEDIATELY RESUBMITTED THE APPEALS, ADDRESSED CONFIDENTIAL LEGAL MAIL TO "MR. LARRY SMALL, WARDEN AT CALIPATRIA STATE PRISON, REQUESTING THAT HE FORWARD THE APPEALS TO THE APPEALS COORDINATOR FOR PROCESSING AND LOGGING. (SCREENED-OUT AGAIN ON 07-29-08; ON INFORMATION AND BELIEF DEFENDANT T. OCHOA IS INVOLVED IN THE APPEAL PROCESS.

VIOLATION REPORTS (CDC 115), 1.) RE: REFUSING A DIRECT ORDER, DATED 06-18-08; LOG NO. 06-08-ASU-005; 2.) RE: REFUSING A ORDER, DATED 06-12-08, 06-08-ASU-003.

THESE PRISON OFFICIALS/OFFICERS ARE OPERATING UNDER A "CODE OF SILENCE" ALSO KNOWN AS "GREEN WALL" WHICH IS A CUSTOM AND POLICY HERE AT CALIPATRIA STATE PRISON. (SEE JOHN HAGAR, SPECIAL MASTER'S FINAL REPORTS RE STATUS OF POST-POWERS REMEDIAL PLAN MONITORING, OCTOBER 12, 2007; GOVERNOR SCHWARZENEGGER TACKLES PRISON REFORM, JUSTICE REPORT, JANUARY 12, 2005; RICHARD RIMMER, DIRECTOR (A) CDCRS, RODERICK Q HICKMAN, AGENCY SECRETARY YOUTH AND ADULT CORRECTIONAL AGENCY, MEMORANDUM, "TO ALL CDCRS EMPLOYEES", SUBJECT: "ZERO TOLERANCE REGARDING THE "CODE OF SILENCE".")

PLAINTIFF HAVE SERVED ABOUT "NINE MONTHS/TWENTY-SIX-DAYS", IN ADMINISTRATIVE SEGREGATION, FOR A CRIME HE WAS FALSELY ACCUSED OF COMMITTING AND PLAINTIFFS WALKING CANE WAS ILLEGALLY, UNJUSTLY, AND "UNCONSTITUTIONALLY" CONFISCATED BASED ON THE FALSIFIED DOCUMENTS OF DEFENDANTS R. JOHNSON, AND T. CATLETT. PLAINTIFF EXPERIENCES "CONSTANT" PAIN, SUFFERING, SWELLING, AND WEAKNESS OF THE (R) KNEE AND HAS LOSSED OVER "FORTY POUNDS". PLAINTIFF ASSERT THAT HIS HEALTH HAS DETERIORATED TO NEAR SKELETON FORM. PLAINTIFF IS ALWAYS WEIGHED WHILE IN PHYSICAL RESTRAINTS TO WIT, WAIST CHAIN; WHICH IS SAID TO WEIGH ABOUT "FOUR POUNDS" AND PLAINTIFFS RECENT WEIGH WAS ABOUT "154 POUNDS" (SUBTRACT FOUR POUNDS), AND HEIGHT IS 5'11 INCHES, 40-YEARS OF AGE. PLAINTIFF CONDITION AND POLICY PREVENTED HIM FROM RECEIVING OUT DOOR EXERCISE FOR NEARLY "TEN MONTHS".

PLAINTIFF ASSERT THAT HE HAS BEEN PERSONALLY HARMED AND/OR ENDANGERED BY THE CONDITION AND/OR PRACTICE PLAINTIFF IS CHALLENGING AND PLAINTIFF IS LIKELY TO BE INJURED AGAIN IF AN

INJUNCTION IS NOT ISSUED. AS THE SUPREME COURT HAS EXPLAINED, " ONE DOES NOT HAVE TO AWAIT THE CONSUMMATION OF THREATENED INJURY TO OBTAIN PREVENTIVE RELIEF. PENNSYLVANIA V. WEST VIRGINIA, 262 U.S. 553, 593 (1923), CITED IN FARMER V. BRENNAN, 511 U.S. 825, 845 (1994), SEE ALSO HELLING V. MC KINNEY, 509 U.S. 25, 33 (1993) (" IT WOULD BE ODD TO DENY AN INJUNCTION TO INMATES WHO PLAINLY PROVED AN UNSAFE, LIFE THREATENING CONDITION IN THEIR PRISON ON THE GROUND THAT NOTHING YET HAD HAPPENED TO THEM.")

PLAINTIFF'S REQUESTS FOR INJUNCTIVE RELIEF IS WELL TAKEN, THE CLAIMS AGAINST DEFENDANTS IN THEIR OFFICIAL CAPACITY SHOULD NOT BE DISMISSED. IN ADDITION, PLAINTIFF'S REQUESTS FOR INJUNCTIVE RELIEF SHOULD NOT BE DISMISSED.

CONCLUSION

FOR THE FOREGOING REASONS, PLAINTIFF RESPECTFULLY REQUEST THIS COURT DISMISS DEFENDANTS MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT IN ITS ENTIRETY.

DATED: JULY 30, 2003.

RESPECTFULLY SUBMITTED,

[signature]

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